
**UNITED STATES OF AMERICA
BEFORE THE DEPARTMENT OF COMMERCE**

**Foothill/Eastern Transportation Corridor Agency
Board of Directors of the Foothill/Eastern Transportation Corridor Agency**

Appellants,

vs.

California Coastal Commission

Respondent.

**APPELLANTS' REPLY BRIEF FOR APPEAL
UNDER THE COASTAL ZONE MANAGEMENT ACT**

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I. A SECRETARIAL OVERRIDE WILL PROVIDE TCA WITH EFFECTIVE RELIEF.

The Commission first contends that the Secretary cannot provide TCA with effective relief. CCC Br. at 6. This has no merit. TCA seeks a Secretarial override to authorize federal agency approval of the Project. This administrative federal appeal is a jurisdictional requirement under the CZMA and its implementing regulations that must be exhausted before any state court judicial review may be sought and before the Commission may approve a permit.

In California, the exhaustion requirement is jurisdictional, not optional. As the California Court of Appeal has explained:

[T]he . . . exhaustion of administrative remedies . . . is a condition to the court's jurisdiction which must be addressed before seeking judicial relief. This rule has specifically been held applicable to anyone seeking to enforce a right granted under a federal statute. ***Administrative proceedings must not only be initiated, but must be pursued to their appropriate conclusion before seeking judicial intervention.***¹

Thus, the Court of Appeal held that the failure to exhaust the administrative appeal remedy provided under the CZMA was a “basic defect,” and one so fundamental that it subjected the state court case to dismissal.² *Id.* at 1065. Citing the 60-day statute of limitations in the Coastal Act (Cal. Pub. Res. Code § 30801), the Commission erroneously suggests that TCA was required to challenge the Commission’s federal consistency decision in a state court mandamus action. CCC Br. at 7. Neither authority cited involved a Commission federal consistency decision and subsequent administrative appeal to the Secretary, as provided in the CZMA. A ruling by the Secretary in favor of TCA will render the Commission’s consistency Objection ineffective.³

¹ *Acme Fill Corp. v. San Francisco Bay Conservation and Dev. Comm'n*, 187 Cal. App. 3d 1056, 1064 (1986) (emphasis added). Contrary to the Commission’s assertion, only one case has declined to follow *Acme Fill* – *In the Matter of Stoeco Development, Ltd.*, 262 N.J. Super. 326 (1993). That case has no relevance here because, unlike California, the exhaustion of administrative remedies doctrine in the State of New Jersey is “one of convenience, not an indispensable pre-condition” (*id.* at 335), and the California courts would necessarily be bound by *Acme Fill* in any event. *Auto Equity Sales, Inc. v. Superior Court*, 57 Cal. 2d 450, 455 (1962).

² The court’s decision on the exhaustion issue was not merely dicta, as the Commission asserts. The court decided the exhaustion issue first, in order to determine the court’s jurisdiction and then addressed the merits because “the questions presented are of law, they pose issues of broad public interest, and the merits of this controversy will not be resolved by the administrative proceeding before the Secretary and are likely to reoccur.” *Acme Fill*, 187 Cal. App. 3d at 1065.

³ Under California law, the Coastal Act statute of limitations for filing a mandamus action would be equitably tolled in any event. The California courts have applied equitable tolling in situations where a plaintiff pursues a timely claim in an

Neither California case law⁴ nor the Commission's own practice supports the Commission's argument. The Commission has reversed itself in permit decisions with the benefit of additional information.⁵ The only constraint the Commission imposes following denial of a project is that the applicant must wait six months before reapplying.⁶

II. THE COMMISSION EXCEEDED ITS CONSISTENCY JURISDICTION.

A. Camp Pendleton Is A Federal Enclave Subject To Exclusive Federal Jurisdiction. It Is Therefore Excluded From The CZMA Definition Of "Coastal Zone."

It is settled law that Camp Pendleton (1) is a federal enclave ceded by the State of California to the United States at the beginning of World War II, and (2) the United States has "paramount and exclusive control."⁷ Cession rendered subsequent state laws, including the Coastal Act, inapplicable.⁸

In his approval of the California Coastal Management Program ("CCMP"), the Secretary of Commerce expressly concluded that the CCMP's definition of "coastal zone" did not include federal enclaves such as Camp Pendleton. Citing California Public Resources Code section 30008, the same section cited by the Commission in its brief (CCC Br. at 8-9), the Secretary first acknowledged the Coastal Act definition of "coastal zone," and then explained:

For purposes of meeting the requirement of Section 304(1) of the CZMA, 'lands the use of which is by law subject solely to the discretion of or which is held in trust by the Federal government, its officers or agents' are excluded from the coastal zone.

Approval of the California Coastal Management Program, Sec. of Commerce, November 7, 1977, p. 4.

The Commission contends that, even if the Project were located on federal lands excluded from

administrative or federal forum, and then files a second action in a state forum after the limitation period has expired. *Lantzy v. Centex Homes*, 31 Cal. 4th 363, 370 (2003).

⁴ *Ojavan Investors, Inc. v. California Coastal Comm'n*, 26 Cal. App. 4th 516, 524 (1984) holds that a failure to timely challenge a Commission decision bars a collateral attack on that decision in a subsequent *judicial* proceeding, not in an administrative proceeding.

⁵ See e.g., Application No. 5-03-013 (Marblehead Project), p. 62.

⁶ Section 13056.1(a) of the Commission's regulations (Cal. Code Regs. tit. 14, §§ 13000 *et seq.*) provides, in relevant part: "Following . . . a final decision upon an application for a coastal development permit, no applicant . . . may reapply to the commission for a development permit for substantially the same development for a period of six (6) months from the date of the . . . final decision."

⁷ *California v. United States*, 235 F.2d 647, 655 (9th Cir. 1956); see also *United States v. Fallbrook Pub. Util. Dist.*, 110 F. Supp. 767, 771-772 (S.D. Cal. 1953); *United States v. Jenkins*, 734 F.2d 1322, 1325 n.2 (9th Cir. 1983).

⁸ *James Stewart & Co. v. Sadrakula*, 309 U.S. 94, 100 (1940); *Stiefel v. Bechtel Corp.*, 497 F. Supp. 2d 1138, 1147 (S.D. Cal. 2007).

the coastal zone under the CZMA, the Commission would have permit jurisdiction over non-federal development of those lands, citing *California Coastal Comm'n v. Granite Rock Co.*⁹ CCC Br. at 9. In that case, however, the plaintiff did *not* “claim that the national forest on which its mining claims lie is a ‘federal enclave’ comparable to a fort or military reservation and subject solely to federal legislative jurisdiction.”¹⁰

B. The Limited Retrocession Of The Leasehold To The State Does Not Affect The United States’ Exclusive Jurisdiction To Approve Roads In Camp Pendleton.

The United States’ temporary lease of land to the Department of Parks and Recreation (“State Parks”) does not alter the United States’ exclusive rights over the siting and construction of the Project on Camp Pendleton. In the Lease, the United States expressly reserved and excepted out of the leasehold the right to grant easements and rights-of-way to third parties. App. 76-133 at Part II p. 1.

Because the Project will be located on an easement that is part of the United States’ underlying and reserved fee interest, it is not part of the leasehold subject to the retrocession. Thus, the approval of the Project within Camp Pendleton remains within the United States’ exclusive jurisdiction.¹¹

The sole purpose of the retrocession was to give concurrent jurisdiction to the state for the limited purpose of administering law enforcement over park users. See Supp. App. 6-51 at p. 1. This limited retrocession applied only to “application of many areas of the penal law and the State Park rules and regulations,” so that “State Park peace officers would have the proper authority to protect the safety of the public and the park system resources.” Supp. App. 6-52 at p. 1.

The Coastal Commission incorrectly claims that the United States does not have exclusive jurisdiction claiming that other state agencies have discretionary jurisdiction over the United States’

⁹ *California Coastal Comm'n v. Granite Rock Co.*, 480 U.S. 572, 594 (1987).

¹⁰ *Granite Rock Co. v. California Coastal Comm'n*, 590 F. Supp. 1361, 1371 (N.D. Cal. 1984) (held in facial challenge the Commission could require a permit for mining activities on land owned by the federal government in national forest in California). See also *Hancock v. Train*, 426 U.S. 167, 179 (1976) (regarding federal enclaves, “where ‘Congress does not affirmatively declare its instrumentalities or property subject to regulation,’ ‘the federal function must be left free’ of regulation”).

¹¹ TCA Br. at 11-12; see also *Davies Warehouse Co. v. Bowles*, 321 U.S. 144, 155 (1944) (body of law controlling acquisition, transmission and transfer of property and that defines rights of owners in relation to the state or private parties is found in statutes and decisions of the state).

reserved property rights. CCC Br. at 10-11. The United States' reserved rights to approve roads are not subject to the discretion of any state agency, including State Parks, for all the reasons discussed above.¹²

C. Neither Federal Nor State Law Provides The Commission With The Authority To Review The Project Inland Of The Coastal Zone.

Before federal consistency review may be extended over the inland portion of the Project, Section 930.53 of the CZMA regulations requires that a coastal management program specify the geographic location in which such authority would be exercised. TCA Br. at 14. The Commission implicitly concedes its failure, but to sidestep Section 930.53, the Commission argues that its supposedly dynamic coastal program was somehow frozen in place 31 years ago, and that it can “cherry pick” any subsequent CZMA regulations it may choose to follow. This assertion is completely unsupported by law.

In *California Coastal Comm'n v. Granite Rock Co.*, the Supreme Court held that the NOAA regulations do indeed govern the exercise of the Commission's consistency review jurisdiction, citing the very regulation at issue:

In order for an activity to be subject to CZMA consistency review, the activity must be on a list that the State provides federal agencies, which describes the type of federal permit and license applications the State wishes to review. 15 CFR 930.53 (1986). If the activity is unlisted, the State must within 30 days of receiving notice of the federal permit application inform the federal agency and federal permit applicant that the proposed activity requires CZMA consistency review. § 930.54. If the State does not provide timely notification, *it waives the right to review the unlisted activity*.¹³

Because Granite Rock's mining operations were not listed, and the state did not follow the notification requirements for unlisted projects, the court held that the Commission “waived its right to consistency

¹² Furthermore, the Commission cannot rely on the I-5 easement to Caltrans to assert that it has authority beyond the limits of I-5. CCC Br. at 10. That retrocession is limited to the I-5 right-of-way. Supp. App. 6-55 at p. 1. That retrocession does not provide the State with authority outside the area subject to the easement. *Id.* For obvious reasons, the Commission did not base its Objection on impacts within the I-5 since that area is already developed as an interstate freeway.

¹³ 480 U.S. at 590-591 (emphasis added). In its answer to Granite Rock's complaint, the Commission formally admitted that NOAA's regulations govern the Commission's exercise of consistency review and conceded that it had waived the right to review part of the company's permitted activities because it had not complied with the requirements of the regulation. See Commission's Answer to Complaint, ¶ XII, included in the Appendix to Jurisdictional Statement, filed by the Commission in the United States Supreme Court.

review.”¹⁴ *California v. Mack*,¹⁵ which addressed the ability to condition a federal grant, not the applicability of the CZMA regulations to the Commission’s CCMP, does not alter this requirement.

Coastal Act Section 30330 does not provide the Commission with authority to exercise consistency review inland of the coastal zone, contrary to the Commission’s argument. CCC Br. at 12. First, the CZMA regulations do not compel coastal states to review federal permits or licenses for consistency. They only *permit* consistency review, *if* a state first specifies the geographical location in which consistency review will be exercised. 15 C.F.R. §§ 923.53, 930.53.

Second, Section 30330 does not specify *where* CZMA powers may be exercised. As discussed in the Principal Brief (at 15-17), Sections 30008, 30103, 30200 and 30604(d), as well as the legislative history quoted, address the geographical limits on the Commission’s exercise of authority. Those sections and the legislative history – as now confirmed by the California Supreme Court¹⁶ – all demonstrate that the Commission’s statutory grant of authority does not extend inland of the coastal zone boundary. As stated by the Secretary of Commerce in approving the CCMP:

[t]he Legislature mapped a specifically defined coastal zone comprised of only those areas of particular concern to the State. (Section 30103). . . . The Act of 1972 had defined a broad coastal zone planning area The Act of 1976 . . . created a new more limited coastal zone comprised of only those specific areas which have been designated by the California Legislature as being of particular concern.¹⁷

Moreover, the Commission’s overly broad reading of Section 30330 ignores the fact that the section explicitly authorizes the San Francisco Bay Conservation and Development Commission to exercise consistency review authority *outside* of the coastal zone, but *no such explicit authority was given to the Coastal Commission*. Consistent with Section 30200, quoted in TCA’s Principal Brief (at 16-17), the Commission’s role instead was limited to review and submission of comments to local

¹⁴ *California Coastal Comm’n v. Granite Rock Co.*, 480 U.S. at 591; *see also S. Pac. Transp. Co. v. California Coastal Comm’n*, 520 F. Supp. 800 (N.D. Cal. 1981) (“[p]ursuant to 15 C.F.R. § 930.53 (1980), state agencies . . . are to develop a list of federal license and permit activities that will probably affect the coastal zone” (*id.* at 807 n.3), as required by “[t]he regulation . . . that governs review of permits . . . for unlisted activities” *Id.* at 807).

¹⁵ 693 F. Supp. 821 (N.D. Cal. 1988) (court holding NOAA could not condition its financial assistance grants to the Commission on a requirement of NOAA approval for guidelines governing oil and gas exploration and development).

¹⁶ *Sierra Club v. California Coastal Comm’n*, 35 Cal. 4th 839 (2005)

¹⁷ Approval of the California Coastal Management Program, Sec. of Commerce, November 7, 1977, p. 6.

governments, which the Coastal Act's principal author, Senator Smith, declared, retained "exclusive jurisdiction" over the projects.¹⁸

Finally, the Commission's interpretation of Section 30330 effectively eliminates the language in Section 30008 that the Coastal Act constitutes the CCMP "within the coastal zone," contrary to the rule that the Coastal Act "is to be construed so as to give effect to all of its provisions"¹⁹

D. The Objection Should Be Overridden Because The Commission's Claim Of "Insufficient Information" Is Procedurally Defective.

The Commission failed to respond to TCA's argument that its Objection cannot legally be based on inconsistent findings relating to wetlands and archeology. TCA Br. at 18, citing App. 1-1 at p. 1. An objection based on insufficient information is "distinct from one in which the state has sufficient information to evaluate whether the project is consistent with the state's coastal management program."²⁰ Asserting both objections together is contrary to CZMA regulations, which state that "[a] state agency may assert alternative bases for its objection, as described in paragraphs (b) and (c) of this [Section 930.63]." 15 C.F.R. § 930.63(a). This provision requires the Commission to choose between an objection based on paragraphs (b) or (c), because the objections are alternatives to each other. The State cannot simultaneously object based on both having and not having sufficient information. App. 1-2 at pp. 25–26. Because its bases for objections conflict, the Commission's Objection should be rejected as procedurally deficient.

The Commission further contends that procedural overrides are "not authorized by the enabling statutes of the CZMA," despite the clear language of the federal regulations governing appeals. CCC Br. at 13 n.5; *see* 15 C.F.R. § 930.129(b). The Final Rule adopting this provision states:

¹⁸ Letter from Senator Smith stated: "The area within which the provisions of [Senate Bill No.] 1277 [enacting the Coastal Act] apply: The coastal commission's jurisdiction and the area to which the provisions of [Senate Bill No.] 1277 apply is the coastal zone and is limited entirely to that area inside the specifically delineated boundaries described in Section 17 of the bill and shown on the maps adopted by Committee The planning and regulatory requirements of this bill do not apply inland of these boundaries of the coastal zone The coastal commission has no direct permit or planning controls, pursuant to [Senate Bill No.] 1277, over any area or the activities of any other public agency outside the coastal zone (i.e., the commission may only deal with those activities occurring within the coastal zone)." *Sierra Club*, 35 Cal. 4th at 853.

¹⁹ *California Coastal Comm'n v. Quanta Inv. Corp.*, 113 Cal. App. 3d 579, 608 (1980).

²⁰ Decision and Findings in the Consistency Appeal of Millennium Pipeline Co., L.P., Sec. of Commerce, December 12, 2003, at 5 ("*Millennium Pipeline*").

“To dismiss an objection because the State has not followed the proper procedures is actually to override the State’s objection on procedural grounds.”²¹ The Commission is simply wrong.

The Commission further claims that “TCA never addresses the merits of the Commission’s objection based on insufficient information.” CCC Br. at 13. This is incorrect. TCA stated that all information was provided in a timely fashion when requested (TCA Br. at 18) and thoroughly discussed the adequacy of the information. TCA Br. at 19–25. As further demonstrated by sections III.A and B, below, sufficient information is available to determine that the Project is in the national interest.

III. THE PROJECT IS CONSISTENT WITH THE OBJECTIVES OF THE CZMA.

A. TCA Has Shown By A Preponderance Of The Evidence That The Project Furthers The National Interest In A Significant And Substantial Manner (Element 1).

1. Economic Development.

The Commission’s attempt to characterize the Project as merely a “local land use decision,” in order to deny that the Project furthers the national interest in “develop[ing] . . . the resources of the Nation’s coastal zone” (16 U.S.C. § 1452(1)), is specious. Even the Commission recognizes that projects that serve “large metropolitan areas” are in the national interest,²² and this Project will benefit the second-largest metropolitan area in the country. *See* App. 1-3(KK) at PDF pp. 23–24.²³ *See also* App. 3-7 at pp. 164, 178, 202. As the Secretary has found, when a project is “necessary in order to sustain the quality of life, as well as future economic growth and development,”²⁴ it meets Element 1. The Project meets these criteria and satisfies Element 1.

The Commission disingenuously suggests that a Project intended to provide coastal access would not contribute to economic development “*in the coastal zone.*” CCC Br. at 17-18 (emphasis in original).

²¹ 65 Fed. Reg. 77,124, 77,150 (Dec. 8, 2000).

²² CCC Br. at 17, citing Decision and Findings in the Consistency Appeal of Islander East Pipeline Co., Sec. of Commerce, March 5, 2004 (“*Islander East*”).

²³ The Commission inaccurately asserted that the “only evidence” that TCA cites to support the Project’s benefit is its own response to the staff report. CCC Br. at 18 n. 7. This is incorrect. The Governor’s letter was cited prominently in TCA’s Principal Brief. TCA Br. at 2, 20, 21. The Governor’s letter reflects the views and knowledge of the many elected officials who recognize the significance of the Project (App. 6-16(B), (C), (G), (J); App. 11-24(F), (K), (L), (Q)-(Y), (CC), (GG)-(VV)), as well as the agencies that included the Project in their state and regional plans. App. 76-126 at Vol. III, p. 11; App. 76-128; Supp. App. 1-8, 1-9.

²⁴ Decision and Findings in the Consistency Appeal of Virginia Electric and Power Co., Sec. of Commerce, May 19, 1994 at 20 (“*VEPCO*”).

The record supports the Project's significant and substantial contribution to the development "in" the coastal zone. *See, e.g.*, Supp. App. 4-20 at pp. 2-1, 3-24-3-27, 3-38-3-40, 4-7; Supp. App. 4-19 at p. 4-2.

2. Siting Of Major Transportation Facilities.

The Commission's argument against a national interest in the orderly process for siting transportation facilities (16 U.S.C. § 1452(1)(D)) relies entirely on misstatements of the relevant standards. The Commission incorrectly asserts that the Project is not coastal-dependent, and that "[t]his alone would be enough to reject the appeal." CCC Br. at 15. Both parts of this assertion are wrong.

The Commission attempts to rely on *Islander East*, which does not help its case. As the District Court concluded regarding *Islander East*: "the Secretary accurately noted that it is relatively easy for projects to satisfy the national interest requirement, because Congress broadly construed the CZMA to include both preservation and development objectives."²⁵

The Secretary stated in *Islander East* that "the Southern Pacific Decision^[26] confirmed that facilities merely passing through the coastal zone can nevertheless be found to further the national interest of CZMA § 303(2)(D)."²⁷ The Secretary found that "[s]tructures may be found to be coastal dependent even if, at times, they can be located on land far removed from coastal resources such as water. [*Southern Pacific*] clearly establishes this principle, holding that the rehabilitation of a railroad bridge involved a coastal dependent activity that satisfied Element 1"²⁸

The Commission unsuccessfully attempts to distinguish *Southern Pacific* on grounds that were nowhere asserted by the Secretary, claiming that the Secretary found the bridge at issue to be coastal dependent because it "had been located in the coastal zone for nearly 100 years." CCC Br. at 16. No citation follows this statement, and with good reason. The Secretary's reasoning is not based on whether the transportation facility is old or new. Rather, it is based on the key purpose of the

²⁵ *Connecticut v. United States Dep't. of Commerce*, No. 3:04-cv1271, 2007 U.S. Dist. LEXIS 59320 at *16 (D.Conn. 2007).

²⁶ Decision and Findings in the Consistency Appeal of Southern Pacific Transportation Co., Sec. of Commerce, September 24, 1985 ("*Southern Pacific*").

²⁷ *Islander East* at 9.

²⁸ *Id.*

transportation facility. *Southern Pacific* at 8-9. The key purpose of the Project is to transport vehicles, cargo, and passengers from one point to another in or near the coast. As the Secretary noted when comparing a pipeline to a railroad bridge on the basis that they both transport something from one point to another, “[t]he principle is the same.” *Islander East* at 9.

The Commission’s analysis additionally relies on an impermissible mischaracterization of the standard applied in *Islander East*, which reasoned that “[b]ridges, like pipelines, are constructed at sites both near and far from water. The primary question for appeals involving these structures is whether their location in *or near* the coastal zone is required to achieve the primary goal of the project in question.” *Islander East* at 9 (emphasis added). The Commission’s principal brief claims that the Secretary may not find that the Project is in the national interest if “the primary objective of the road can be achieved without locating it *in* the coastal zone.” CCC Br. at 15 (emphasis added). The Commission changes “in or near” to “in” – a standard never previously applied.

According to the Commission, the Project violates this nonexistent standard because it could theoretically be constructed outside of the coastal area. CCC Br. at 15–16. This is wrong because alternatives to the Project are neither “reasonable” nor “available,” as discussed below. Even if this were not the case, however, the Project would still meet the coastal dependency test for transportation facilities. The entire goal of the Project is to reduce congestion “in or near the coastal area.”²⁹

Even if the Project were not coastal dependent, however, it would still meet Element 1. In *VEPCO*, the Secretary reasoned that “[w]hile the proposed project is *not itself a coastal-dependent use*, it will indirectly promote the development of coastal and non-coastal-dependent uses in the southeastern Virginia coastal zone.” *VEPCO* at 20 (emphasis added). The Secretary noted that the *only* non-coastal projects that the Secretary has found not to meet the “national interest” standard were “limited residential projects.” *Id.*; see also Decision and Findings in the Consistency Appeal of Jessie W. Taylor,

²⁹ All of the alternatives, including those supported by the Commission, are in or near the coastal area. See e.g., App. 20-49 at pp. 2-28–2-55; Supp. App. 6-54 at pp. 3–4.

Sec. of Commerce, Dec. 30, 1997; (minor, non-coastal dependent commercial development met the CZMA national interest objective). This Project, like the project at issue in *VEPCO*, is “readily distinguishable” from limited residential projects and is clearly in the national interest.³⁰ *VEPCO* at 20.

3. Public Access To The Coast For Recreational Purposes.

The Commission’s lead argument against coastal access demonstrates, yet again, the Commission’s propensity to invent standards that are unsupported by regulation or precedent. The Commission acknowledges that the Project increases public access to public beaches, but then asserts that there is an obligation to demonstrate “quantifiable net increase in public access.” CCC Br. at 18-19. No such obligation of “quantification” exists. In fact, the court decision upholding the Secretary’s consistency decision in *VEPCO* rejected a similar contention. *See North Carolina v. Brown*, No. 94-1569, 1995 U.S. Dist. LEXIS 22393, *1 (D.D.C. 1995). The state of North Carolina contended that the Secretary was required to consider “how much” development the project at issue, a water pipeline, would promote. *Id.* at *24. The court concluded that the unquantified evidence presented to the Secretary was sufficient for his decision. *Id.* at *28. The Commission itself has not required “quantification” of public access benefits in previous consistency determinations. App. 5-12 at pp. 6–7. Further, TCA provided evidence supporting increased recreational access, including a Department of Parks and Recreation assessment of impacts, which concluded that “FTC-S will provide greater access to the coast and substantially increase [San Onofre State Beach] park visitation. . . .” *Id.* at p. 7.³¹

Based on a decision that has not been made, the Commission states in absolute terms: “State Parks says it would abandon the Cristianitos Subunit of the Park if the toll road is constructed as proposed.” CCC Br. at 19. In fact, as noted in TCA’s Principal Brief, the California Secretary of

³⁰ The 2000 revision to the CZMA regulations did not make the coastal dependency finding mandatory. As has always been the case, the determination of whether major, non-coastal dependent projects meet national objectives “will depend on the Secretary’s decision record.” 65 Fed. Reg. 77,124, 77,150 (Dec. 8, 2000).

³¹ *See also* App. 3-7 at pp. 164–165, 167–168, 177–178; App. 3-8 at pp. 204–205, 214, 218–221, 222–223, 227–228, 235, 237–238, 250–252.

Resources has concluded that “the campground will remain enjoyable, accessible and open.”³²

The Project clearly will increase public access to the coast for public recreational purposes.³³

4. Water Quality Benefits.

The Commission’s argument that the Project’s water quality improvements are “a solution in search of a problem” ignores the fact that runoff from the existing I-5 freeway currently discharges, untreated, into the Trestles beach area. CCC Br. at 22. The Project will reduce total suspended solids and heavy metals from freeway runoff. App. 8-20(B) at pp. 87–90. The fact that a receiving water body is not yet “impaired” by pollution does not mean that pollution has no impact. Since the 1970s, state and federal water quality laws have regulated pollutant discharge without regard to the status of the receiving water and do not allow pollution up to the point at which “impairment” is reached. *See EPA v. California ex rel. State Water Res. Control Bd.*, 426 U.S. 200, 202-203 (1976). App. 8-20(B) at p. 88.

The Project’s water quality benefits are a commitment made in the FEIR (App. 20-51 at pp. 4.9-8–4.9-9). TCA is bound by its FEIR commitments. *See* Cal. Code Regs. tit. 14, § 15126.4(a)(2). The Regional Water Quality Control Board letter referenced in the Commission’s brief denied the permit “without prejudice,” which “is done for procedural, not substantive, reasons and does not include any judgment on the technical merits of the project.” CCC App. at p. 23. The fact that technical, construction-level permits remain to be completed has no effect on the preponderance of the evidence showing that the Project’s water quality benefits will be significant and substantial.

5. Public Safety.

The Commission’s argument that improved evacuation routes are unimportant again relies on the red herring of “quantification,” which is not required for the reasons discussed above in Section III.A.5. The Commission fails to counter the evidence in the record showing that significant and substantial

³² TCA Br. at 38 quoting Letter from California Resources Secretary to CCC (February 1, 2008), App. 5-13(D) at p. 2.

³³ The Commission makes several additional irrelevant and unsupported contentions, including a confused argument based on state law regarding compliance with the California Public Park Preservation Act. CCC Br. at 19–20. Because the Secretary has no jurisdiction to decide this issue – which, in any event, is irrelevant to the determination of compliance with CZMA objectives – it is neither necessary nor appropriate to address the Commission’s errors.

benefits will result from reduced evacuation times.³⁴

CZMA Section 303 states that there is a national interest in “improved protection of life and property in hazardous areas.” 16 U.S.C. § 1452(3). The Commission summarily concludes that “this provision does not concern evacuation routes.” CCC Br. at 21. The Commission appears to be under the impression that mention of management plans in this provision somehow eliminates public safety concerns from the national interest. In fact, states are encouraged to prepare management plans for *all* of the “national interests” listed in CZMA Section 303. For example, “through the development and implementation of management programs” (16 U.S.C. § 1452(2)), states are encouraged to provide for “public access to the coast for recreation purposes.” 16 U.S.C. § 1452(2)(E). The Commission did not, of course, contend that coastal access is not a national interest. There is a national interest in protecting life and property in hazardous areas.

6. Air Quality.

The Project’s air quality benefits are confirmed by the Project EIS/EIR and by air quality plans approved by the state and federal air quality agencies. The Project is designated as a Transportation Control Measure in the air quality management plans approved by the State of California and EPA, and is a key part of the regional strategy for achieving federal air quality standards.³⁵ It will also reduce regional greenhouse gas (“GHG”) emissions by 568,549.60 pounds per day. App. 10-23(B) at p. 4.³⁶ In light of the substantial population increases that will occur in the Project area (App. 20-48 at p. ES-21), the *reduction* in GHG emissions and the criteria pollutants is a significant and substantial benefit.

The Commission’s claim of insufficient information results entirely from the Commission’s refusal to acknowledge the facts. The Commission claims that TCA did not specify how it calculated carbon dioxide (CO₂) emissions, including construction tailpipe emissions, despite the fact that this

³⁴ TCA Br. at 28-29; App. 20-49 at p. 2-15; App. 20-48 at pp. ES-14, ES-102, ES-103. *See also* App. 3-7 at pp.172-173; App. 3-8 at pp. 225-226, 233-34, 279-280, 293-294.

³⁵ *See* Supp. App. 6-53 at pp. AP I-1 – I-3, 5-49 at pp. 37-39, 5-45 – 5-48; TCA Br. at 24-25, 29-30.

³⁶ TCA has also committed to implementing additional GHG reduction measures. App.10-23(B) at pp. 6-8.

evidence was in fact provided.³⁷ CCC Br. at 24. In fact, the Commission apparently attempted to reproduce the results, which would mean that it used the same models. The Commission could not reproduce these results because the Commission's staff report inaccurately portrayed the amount of asphalt required.³⁸ The information provided by TCA relating to air quality impacts and benefits is Project-specific, based on the approved traffic models and employing state of the art air quality models approved by the air quality agencies. App. 20-50 at p. 3–6. The Commission's competing evidence, in contrast, consists of generalized studies and conclusions. App. 1-2 at pp. 257–261. Air quality benefits are established by a preponderance of the evidence.

7. National Defense.

The Commission's entire argument is based on misstatements of fact, mischaracterizations of TCA's Principal Brief,³⁹ and unsupported assertions deriding the Project's national defense benefits. The Project provides important infrastructure and training benefits to Camp Pendleton. TCA Br. at 26–28, 47–48. These improvements will not be provided in the absence of the Project.

The Commission incorrectly claims that the San Onofre Gate improvements merely mitigate adverse effects on Base security. CCC Br. at 25. The record proves otherwise; these improvements are not identified anywhere as mitigation measures (App. 24-52 at pp. 8-1 – 8-48) and are additional benefits provided by the Project. App. 13-31(B) at p. 8. The Commission's sole support for the statement that Green Beach access is unimportant is the fact that Green Beach is not used for training as often as other facilities. CCC Br. at 25-26. This is, of course, an argument in favor of the importance of the Green Beach access facilities, because limited access precludes full use of Green Beach for training.

³⁷ Construction tailpipe emissions were calculated using URBEMIS2007. App. 8-20(B) at p. 97. CO2 emissions from asphalt were calculated using information from the California Energy Commission. *Id.* at p. 97 n.22. Tailpipe emissions were calculated using EMFAC2007 and project-specific traffic data (GHG analysis). EMAC2007 is the emission model that is currently approved for use in California by the EPA and the California Air Resources Board. App. 5-11 at p. 34.

³⁸ As explained in TCA's submittal of information to the Commission (which the Commission ignored). App. 5-11 at p. 35.

³⁹ The Commission's clumsy and ineffective effort to distinguish the *VEPCO* consistency decision is a prime example. TCA's Principal Brief states that "[b]enefits to military facilities vital to the national defense are an important factor in assessing the national interest served by the Project." TCA Br. at 26, citing *VEPCO*. The Commission transforms this into an alleged TCA claim that "any benefit to a military facility, no matter how small, is important." CCC Br. at 25 n.14 (distinguishing *VEPCO* on the basis of "larger benefit"). *Id.* At no time did TCA imply that benefits from the Project are small; nor did the Secretary address the "size" of the project in *VEPCO*.

The Commission invents, out of whole cloth, a claim that these improvements “are not really part of the toll road and are items that the Secretary of the Navy was supposed to fund using the monies TCA paid for the easement.” CCC Br. at 47 n.24. Aside from appearing to accuse the Secretary of the Navy of malfeasance, this assertion is simply wrong. The Project will provide these improvements in addition to paying for the easement, constituting a substantial and significant benefit to national defense. *See generally* App. 73-106.

B. The National Interest Promoted By The Project Outweighs Any Adverse Coastal Impacts (Element 2).

Under the Element 2 test, “if the State interest, or effects to coastal resources, and the national interest are equal, then the national interest in the activity will take precedence.” 65 Fed. Reg. at 77,150. TCA has established by a preponderance of the evidence that the Project’s contribution to national interests outweighs adverse coastal impacts.

Much of the Commission’s brief focuses on justifying its decision under state law. *See, e.g.*, CCC Br. at 31. The Commission’s efforts to invoke the California Coastal Act do not support its case on appeal because “a Secretarial override is not a review of whether the Commission properly interpreted the California Coastal Act; rather it is a consideration of whether the proposed activity meets the statutory and regulatory criteria for an override established in the CZMA. Thus, the concept of deference is inappropriate in the appeals proceeding”⁴⁰

1. Environmentally Sensitive Habitat Areas And Endangered Species.

The Commission’s brief seeks to discount the biological opinion of the U.S. Fish and Wildlife Service (“Service”) because the Service’s 2005 no-jeopardy opinion was preliminary. *See* App. 72-102. The Service has now issued a comprehensive, 246-page, *final* biological opinion that concludes that the Project complies with the federal Endangered Species Act. *See* Supp. App. 6-50. The Service’s

⁴⁰ Decision and Findings in the Consistency Appeal of Chevron U.S.A. Inc. from an Objection by the California Coastal Commission, Sec. of Commerce, October 29, 1990, at 5.

comprehensive analysis belies the Commission’s hyperbolic claims regarding impacts to threatened and endangered species.

The Commission emphasized alleged impacts on the Pacific pocket mouse (“PPM”) – despite the absence of *any* evidence of PPM within the Project footprint or the coastal zone. In contrast, the Service concluded:

Overall the proposed project footprint avoids all known occupied PPM habitat, while providing much needed management and protection . . . for the San Mateo North population. . . . [A]ll known occupied PPM habitat and nearly all restorable land adjacent to such habitat . . . will be managed within the . . . PPM Management Area. These potentially restorable lands represent the best opportunity to stabilize or expand known occupied PPM habitat

Supp. App. 6-50 at p. 164.

The Service’s final biological opinion also contradicts the Commission’s claims about impacts to other species. With respect to the arroyo toad, the Service concluded, “with implementation of the conservation measures, the impacts associated with the proposed toll road are not expected to appreciably reduce the numbers, reproduction, or distribution of the toad in the action area or throughout the species’ range.” Supp. App. 6-50 at p. 66.

With respect to the coastal California gnatcatcher, the Service found that, following the required restoration of habitat, “the total number of gnatcatchers rangewide is anticipated to remain similar or increase slightly upon completion of the proposed project. In addition, habitat for 18 to 21 pairs will be conserved.” *Id.* at pp. 89–90.

The Commission’s claims regarding the tidewater goby are also contradicted by the Service, which found that “[b]oth temporary and permanent habitat impacts are very small, with permanent impacts limited to bridge footings and a small amount of potential habitat degradation due to shading.” *Id.* at p. 49.

The Commission yet again ignored the fact that NOAA Fisheries concurred in the determination of the FHWA that the Project is not likely to adversely affect the steelhead trout. App. 8-19(C) at pp. 1–

3; TCA Br. at 6–7.

The Commission incorrectly claims that TCA did not argue that findings relating to the least Bell’s vireo and San Diego fairy shrimp “were improper.” CCC Br. at 31 n.15. TCA objected to all of the Commission’s findings relating to ESHA and endangered species and further stated that “the Project, with mitigation, will not jeopardize *any* species’ survival and will not adversely modify *any* critical habitat.” TCA Br. at 30 (emphasis in original). The preliminary non-jeopardy determination for the least Bell’s vireo and fairy shrimp is at App. 72-102 at p. 1-3; *see also* App. 8-20(B) at pp. 32-35, 38. In its Final Biological Opinion, the Service concluded that the Project “is not likely to jeopardize the continued existence of the vireo” and that TCA’s conservation measures “will support recovery of the vireo.” Supp. App. 6-50 at p. 108. The Service determined that the Project “is not likely to adversely affect” either the San Diego fairy shrimp or the Riverside fairy shrimp. Supp. App. 6-50 at pp. 3–5.

2. Wetlands.

The Commission’s entire wetlands argument is a justification of its decision under state law. The Commission further claims that TCA “did not provide sufficient information” (CCC Br. at 31), but it never addresses the additional information provided by Glenn Lukos Associates. *See* App. 5-11 at Attachment 3, p. 1-6, PDF pp. 54-59. This information (1) responds to claims made by Project opponents’ wetland biologist, and (2) provides additional information on mitigation. The Commission simply ignored this information in both the Objection (App. 1-2 at p. 130) and its brief (CCC Br. at 31).

The memorandum that the Commission ignored summarizes the Project’s minimal impacts on wetlands, noting that permanent impacts to wetlands over which the Commission claims jurisdiction are limited to four 70-square foot bridge piers within San Mateo Creek, the extension of three existing two-foot wide bridge bents within San Onofre Creek, and 0.147 acre of stabilizing arroyo willow. The memorandum notes that, “[b]y not accounting for the fact that 97% of the wetland habitat to be impacted is within 100 feet of the existing edge of the I-5 freeway, and therefore already ‘permanently degraded

by the negative indirect impacts” of the I-5, the implication is that the FTC-S project would impact pristine wetland habitat.⁴¹

The memorandum also summarizes mitigation measures, noting that 6.3 times as much habitat will be provided compared to permanently affected wetlands. The mitigation site, unlike the affected wetlands, will not receive untreated flows from the I-5. The memorandum concludes that the mitigation site does sufficiently mitigate for permanent impacts as well as providing conservation value.

Id. at p. 5, PDF p. 58. The record – including evidence that the Commission requested, yet failed to consider – establishes that impacts on wetlands are minimal and mitigated.

3. Additional Coastal Issues.

The Commission’s brief provides no support for its claim that the Project will affect surfing at Trestles. The Commission states that the Project’s “41 million yards” of cut and fill “could easily” cause impacts. CCC Br. at 34. This argument misstates both the amount and impacts of excavation. Most of the cut and fill for the Project occurs in the San Juan Creek watershed – many miles inland of the coastal zone and in a completely different watershed than Trestles Beach. The Commission has not and cannot show that cuts and fills in a different watershed would have impacts on the Trestles surf break.⁴² The Commission’s arguments relating to water quality are addressed in Section III.A.4, above.⁴³

The Commission claims that impacts on archeological resources are unacceptable and that it has insufficient information to determine whether impacts are acceptable. Not only are these conflicting claims procedurally impermissible (*see* Section II.D, above), they are both wrong. The Commission requires no additional information to determine impacts on archeological resources within its jurisdiction, which have been thoroughly documented. TCA Br. at 40. The Commission cannot require

⁴¹ App. 5-11 at Attachment 3, p. 1–2, PDF p. 54–55.

⁴² *See also* App. 8-20(B) at Attachment 17, p. 1–2, PDF pp. 394–395; App. 8-20(B) at pp. 70–86; App. 12-29(F) at pp. 1–4; App. 17-32(M).

⁴³ Although the Commission’s brief mentions effects on “public views,” it understandably appears to have relinquished its defense of this finding, which was addressed in TCA’s Principal Brief. TCA Br. at 38–40.

the final, construction-level mitigation plan for every possible impact before determining consistency – which is precisely what the Commission has proposed when it claims it requires the detailed Historic Property Treatment Plan before determining consistency. CCC Br. at 35. As stated by Chairman Anthony Rivera, spokesman for the Juaneño Band of Mission Indians, Acjachemen Nation, “the proposed project represents a balance between competing interests and priorities with the design and mitigation included in the project. . . . Contrary to the staff report, there is more than adequate information.” App. 3-8 at p. 213.

Public access issues, including the fact that neither San Mateo Campground nor coastal trails will be lost as alleged by the Commission, were addressed above, in Section III.A.3, and in the Principal Brief. TCA Br. at 37–38. GHG emissions are also addressed above in Section III.A.6.⁴⁴

When the Project’s contributions to the national interest are weighed against coastal impacts, the national interest (including the national interest of the national defense improvements) clearly prevails:

The facts are clear when we strip away the sound and the fury. Let me just state few of these: no damage to the surf; cleaner water off of 1-5; more access to the coast for all Californians, not just the privileged few; wetlands mitigation on a 6:1 ratio; preservation and even enhancement of endangered species; no loss of camp sites; \$100 million for park enhancements; safety valves for emergencies; cleaner air in the region.

App. 3-8 at p. 327. The Commission’s Objection should be overridden.

C. The Commission Has Not Proposed A Reasonable, Available Alternative To The Project (Element 3).

The Commission is required to propose “reasonable” and “available” alternatives.⁴⁵ The Commission may not limit its consideration of impacts to the coastal area; rather, the “complete route” of the alternative must be found to be reasonable and available.⁴⁶ The record provides ample evidence

⁴⁴ The Commission’s brief includes a single reference to energy, stating that Project opponents said that the energy analyses needed to be redone. CCC Br. at 35-36. The Project’s consistency with energy reduction policies is set forth in App. 5-11 at pp. 35–38.

⁴⁵ Decision and Findings in the Consistency Appeal of Union Exploration Partners, Ltd. with Texaco Inc. from an Objection by the State of California, Sec. of Commerce, January 7, 1993, at 34.

⁴⁶ *Millennium Pipeline* at 26.

that Project alternatives are neither reasonable nor available.⁴⁷ The Commission's brief failed to refute any of this evidence.

The Commission's unsupported, conclusory assertions cannot overcome the facts that (1) the Project alignment was selected after a six-year, \$20 million alternatives analysis by state and federal transportation and environmental agencies, and (2) the U.S. EPA and U.S. Army Corps of Engineers ("COE") both identified the Project as the preliminary least environmentally damaging practicable alternative. App. 72-99, 72-100. On May 1, 2008, the District Commander of the Corps of Engineers stated that "I stand by that preliminary determination" and that the Corps' November 1, 2005 identification of the Project as the preliminary LEDPA "continues to represent our agency's official position." Supp. App. 5-44 at p. 1; *see also* Supp. App. 5-38, 5-39.

The Commission does not even attempt to show that the alternatives evaluated by the federal agencies in the DEIS/EIR (CC-ALPV, A7C-ALPV, AIO, and I-5) are reasonable and available.⁴⁸ In each case, the Commission merely concludes that the alternative "could be conducted in a manner consistent with the CCMP." CCC Br. at 43-45. Although many of these alternatives have environmental impacts similar (or greater) to those upon which the Commission bases its Objection (Supp. App. 6-54; App. 20-49 at pp. 2-11—2-12), the Commission does not explain its conclusion that the alternatives (but not the Project) could be conducted consistently with the CCMP.

The Commission's alternatives argument focuses primarily on the so-called AIP/R alternative. The Commission's brief simply ignores the data presented by TCA and by Caltrans establishing that the AIP/R alternative is flawed, infeasible and has enormous coastal impacts. App. 5-11 at pp 2–7. After

⁴⁷ *See e.g.* App. 20-21 to 49 at pp. 2-11—2-13; App. 17-34; App. 16-32(C); App. 16-32(E); Letter from Mayor of San Clemente Jim Dahl (Sept. 25, 2007), App. 11-24(QQ); TCA Letter to T. Magness, Army Corps (April 15, 2008), Supp. App. 5-37.

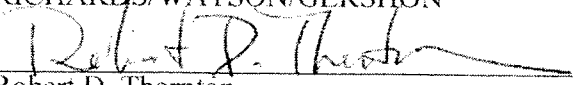

⁴⁸ The Commission's brief cites an April 2008 letter from the COE (CCC Br. at 4-5) which, as detailed in a response from TCA (Supp. App. 5-37) contains serious misstatements concerning the nine-year collaborative federal-state environmental review process undertaken for the Project. This process resulted in the identification of the Project as the preliminary Least Environmentally Damaging Practicable Alternative ("LEDPA") by the COE. Army Corps Letter to FHWA (Nov. 1, 2005), App. 72-100 at pp. 1–2. As detailed in TCA's response, the statement in the Commission's brief that the COE has not determined that other alternatives are not "practicable" does not affect the issue of whether alternatives are "reasonable" and "available," because the standards applied by COE are not the same as the CZMA standards for consistency overrides. TCA Letter to T. Magness, Army Corps (April 15, 2008), Supp. App. 5-37 at p. 5.

reviewing the “revised” AIP/R alternative, which attempted to shore up the alternative in the face of a barrage of criticism from transportation experts, Caltrans reiterated that the AIP/R alternative “does not meet the Department standards ... does not meet the applicable engineering standards of care.” Supp. App. 1-1; App. 3-8 at pp. 362–363. Caltrans found that the alternative did not meet safety standards (Supp. App. 1-1 at Attachment, p. 1), that right-of-way impacts will be much greater than indicated in the Smart Mobility report (*id.*, Attachment, p. 3) and that operational benefits will not be as great as stated by Smart Mobility (*id.*). *See also* Supp. App. 1-2 to 1-3.

The Commission dismisses the lack of funding for the AIP/R alternative with the single nonchalant comment that “the lack of current funding for the AIP/R is due to the fact that funding has not been sought.” CCC Br. at 42. The Commission does not and cannot show that it would be possible – within a reasonable timeframe, or ever – to obtain funding for this multi-billion dollar alternative, which is so strongly opposed by the coastal communities that it would devastate.⁴⁹

The AIP/R alternative could only be implemented if the destruction of large swaths of established coastal communities, the failure to comply with state highway safety standards, and a complete absence of funding were unimportant. Because “[t]heoretical availability of the alternative does not translate to availability in reality” (*N. Carolina v. Brown*, 1995 U.S. Dist. LEXIS, at *44), the Commission has failed to show by a preponderance of the evidence that its preferred alternative is available and reasonable.

Dated: May 5, 2008

Respectfully submitted,
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⁴⁹ Letter from Mayor of San Clemente Jim Dahl (Sept. 25, 2007), App. 11-24(QQ) at PDF p. 116; App. 3-7 at pp. 93–94, 185; App. 3-8 at p. 363; *see generally* Supp. App. 2-15, Supp. App. 2-12.

CERTIFICATE OF SERVICE

The undersigned declares:

I am employed in the County of Orange, State of California. I am over the age of 18 and am not a party to the within action; my business address is c/o **Plaza Copy & Imaging**, 610 Newport Center Drive, Suite 50, Newport Beach, CA 92660.

Consistent with 15 C.F.R. § 930.127, on **May 5, 2008**, I served the foregoing **Appellants' Reply Brief of Appeal Under the Coastal Zone Management Act and Supplemental Appendix** on parties to the within action as follows:

Via Federal Express: One hard copy of the Appellant's Reply Brief of Appeal Under the Coastal Zone Management Act and Supplemental Appendix to:

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- ☒ (By Overnight Service) I served a true and correct copy by overnight delivery service for delivery on the next business day. Each copy was enclosed in an envelope or package designated by the express service carrier; deposited in a facility regularly maintained by the express service carrier or delivered to a courier or driver authorized to receive documents on its behalf; with delivery fees paid or provided for; addressed as shown on the accompanying service list.
- ☒ (FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.
- ☒ Executed on May 5, 2008.



Rian Kennedy
Senior Account Executive
Plaza Copy & Imaging

CERTIFICATE OF PERSONAL SERVICE

I, the undersigned, declare:

I am over the age of 18 years, employed in the District of Columbia, and am not a party to the above-entitled cause. My business address and place of employment is: **Same Day Process Service**, 1322 Maryland Ave. NE, Washington, DC 20002.

Consistent with 15 C.F.R. § 930.127, on May 5, 2008, I served the following document(s) **Appellants' Reply Brief of Appeal Under Coastal Zone Management Act and Supplemental Appendix** on the person(s) hereinafter mentioned by personally delivering a true copy thereof to a person accepting service as follows:

**U.S. Secretary of Commerce
Herbert C. Hoover Building
14th Street and Constitution Avenue,
NW
Washington DC 20230**

Executed on May 5, 2008.



(FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

(Printed Name)

(Signature)

CERTIFICATE OF PERSONAL SERVICE

I, the undersigned, declare:

I am over the age of 18 years, employed in the District of Columbia, and am not a party to the above-entitled cause. My business address and place of employment is: **Same Day Process Service**, 1322 Maryland Ave. NE, Washington, DC 20002.

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Executed on May 5, 2008.



(FEDERAL) I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

(Printed Name)

(Signature)